

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE	)	
FOR BENEFICIAL APPLICATION	)	FINAL
FOR BENEFICIAL WATER USE	)	ORDER
76D-104069 BY JAY PARKS	)	

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained the June 30, 1999, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 76D-104069 is hereby granted to Jay L. Parks to appropriate 20.97 gallons per minute up to 16.77 acre-feet of water per year from Indian Creek at a point in Lot 8, Lindsay Acres Unit 3, further described as the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 3, Township 36 North, Range 27 West, Lincoln County, Montana, for fish and wildlife. The permitted place of use shall be an off-stream reservoir with a capacity of 0.7 acre-foot in Lots 8 and 9 of Lindsay Acres Unit

Final Order  
Jay Parks  
App. 76D-104069

Page 1

**CASE #** 104069

3, further described as the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of said Section 3. The permitted period of appropriation shall be from November 1 through April 30, inclusive of each year.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

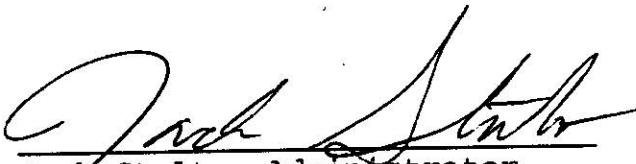
C. Applicant shall install a pipe that will divert no more than 20.97 gallons per minute and the return flow pipe must be sized to release a minimum of 20.97 gallons per minute. Applicant shall install a control valve or other method of control so that water will not be diverted when Glen Lake Irrigation District water is not available during the irrigation season or when a senior appropriator calls the source. Applicant must provide the Kalispell Water Resources Regional Office Manager with the proposed pipeline sizes and a controlling device for approval prior to installation. Failure to provide this information to the Kalispell Water Resources Regional Office will be cause to revoke the permit.

**NOTICE**

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape or the oral proceedings to the district court.

Dated this 10<sup>th</sup> day of August, 1999.

  
Jack Stults, Administrator  
Water Resources Division  
Department of Natural  
Resources and Conservation  
PO Box 201601  
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This is to certify a true and correct copy of the foregoing  
Final Order was served on all parties listed below on this 13<sup>th</sup>  
day of August, 1999, as follows:

JAY L PARKS  
PO BOX 217  
HARLEM MT 59526


QUIRK CATTLE CO INC  
2547 BURMA RD  
EUREKA MT 59917

PEARL J HARK  
4220 INDIAN CREEK RD  
EUREKA MT 59917

DHARMA REALM BUDDHIST ASSOC  
DBA PINE GROVE RANCH  
1792 MT HWY 37  
PO BOX 24  
EUREKA MT 59917

NANCY ANDERSEN, CHIEF  
WATER RIGHTS BUREAU  
DEPARTMENT OF NATURAL  
RESOURCES & CONSERVATION  
PO BOX 201601  
HELENA MT 59620-1601

KURT HAFFERMAN, MANAGER  
JUDY JENIKER, WRS  
KALISPELL WATER RESOURCES  
REGIONAL OFFICE  
DEPARTMENT OF NATURAL  
RESOURCES & CONSERVATION  
109 COOPERATIVE WAY SUITE 110  
KALISPELL MT 59903

  
Mandi Shulund  
Hearings Assistant



BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE	)	
FOR BENEFICIAL APPLICATION	)	PROPOSAL
FOR BENEFICIAL WATER USE	)	FOR
76D-104069 BY JAY PARKS	)	DECISION
	)	

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on May 5, 1999, in Eureka, Montana, to determine whether a beneficial water use permit should be issued to Jay Parks (Applicant) for the above application under the criteria set forth in Mont. Code Ann. § 85-2-311 (1) and (5) (1997).

**APPEARANCES**

Applicant appeared at the hearing in person.

Objector Pearl J. Hark appeared at the hearing in person. Grant Hark testified for Mrs. Hark. Objector Quirk Cattle Co., Inc. appeared at the hearing with Leland Driggs presenting testimony. Dharma Realm Buddhist Assoc., D.B.A., Pine Grove Ranch appeared at the hearing with Eric Parrish presenting testimony.

**EXHIBITS**

Neither Applicant nor Objectors offered exhibits for the record.

Proposal for Decision  
Jay Parks  
App. 76D-104069

Page 1

**CASE # 104069**

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, makes the following:

**FINDINGS OF FACT**

1. An application for beneficial water use permit in the name of and signed by Jay Parks was filed with the Department on May 19, 1998, at 4:15 p.m. (Department file.)

2. Pertinent portions of the application were published in the *Tobacco Valley News* a newspaper of general circulation in the area of the source, on October 15, 1998. Additionally, the Department served notice on individuals and public agencies which the Department determined might be interested in or affected by the proposed appropriation. Three timely objections were received by the Department. Applicant was notified of the objections by a letter from the Department dated November 12, 1998. (Department file.)

3. Applicant proposes to appropriate 24.00 gallons per minute up to 21.77 acre-feet of water from Indian Creek at a point in Lot 8 of Lindsay Acres Unit 3, more specifically described as the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 3, Township 36 North, Range 27 West, Lincoln County, Montana. The proposed uses are 16.77 acre-feet of water for fish and wildlife and 5.00 acre-feet of water for lawn and garden. The proposed places of use are: for lawn and garden, Lots 8 and 9 of Lindsay Acres Unit 3, further described as the W $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ , E $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ , and W $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  all in said

Section 3; for fish and wildlife, an off-stream reservoir with a capacity of 0.7 acre-foot in Lots 8 and 9 of Lindsay Acres Unit 3, further described as the SW~~1~~/~~4~~NW~~1~~/~~4~~NE~~1~~/~~4~~ of said Section 3. The proposed means of diversion is a pipeline. The proposed period of diversion is from January 1 through December 31, inclusive of each year. The proposed off-stream reservoir would be a flow-through pond with screened pipeline into and out of the pond. A pump would divert the water from the pond for irrigation of the lawn and garden. The proposed period of diversion for lawn and garden is from April 15 through October 15, inclusive of each year. (Department file and testimony of Applicant.)

4. Applicant has proven by a preponderance of evidence there is water physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. He has not proven the water can reasonably be considered legally available during the period in which Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department.

Annora Nelson of the Lincoln County Conservation District measured the flow of Indian Creek at 2.93 cubic feet per second on August 7, 1998, otherwise, Applicant relied on the information provided in 1996 for the hearing *In the Matter of the Application for Beneficial Water User Permit 76D-95828 by John J. and Alma L. Foss*. This information shows the flow of Indian Creek was measured at a rate of 4.0 cubic feet per second in November 1995,



and the flow rate on January 17, 1996, was 4.5 cubic feet per second. Using the Orsborn method, an NRCS employee estimated the mean flow rate per month in cubic feet per second as follows:

January	6.3	July	19.9
February	6.4	August	6.9
March	7.6	September	5.8
April	21.3	October	6.3
May	57.8	November	8.9
June	60.5	December	6.9

This flow rate is augmented by Glen Lake Irrigation District (GLID) from April or May to October. None of the GLID flow was included in these calculations. Water users above Foss' proposed point of diversion have water rights for approximately 15.34 cubic feet per second of the water from Indian Creek per month from April through October. The rest of the year, approximately 0.1 cubic feet per second is diverted. Therefore, the adjusted mean monthly flow rate (estimated monthly flow minus water right flows of record) in cubic feet per second, is available at the Foss' proposed point of diversion as follows:

January	6.2	July	4.56
February	6.3	August	0.0
March	7.5	September	0.0
April	5.96	October	0.0
May	42.46	November	8.8
June	45.16	December	6.8

During the months of August, September, and October, there is no unappropriated water. Any water flowing in Indian Creek during these months most likely is GLID water.

Applicant's property is approximately 1,600 feet downstream from the Foss property. Conditions are much the same as when Mr.

and Mrs. Foss filed their application. There still is no unappropriated water during the months of August, September, and October. Applicant has been accepted as a minimum use member of GLID for irrigation and to fill the pond. From May through October, Applicant would use GLID water which reduces his proposed period of use from November 1 to April 30 for the fish pond, inclusive of each year. For that period, there is a preponderance of evidence the water is both physically and legally available. (Department file and testimony of Applicant.)

5. Applicant has proven by a preponderance of evidence the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation would not be adversely affected.

Objectors Quirk Cattle Company and Pearl Hark are located upstream from the proposed project and their water rights are senior in priority, thus their water rights cannot be adversely affected by this project.

The Department cannot deny an application based on possible proliferation of similar applications in the future as suggested by Objectors. Every application must be examined on its own merits. If an applicant can prove by a preponderance of evidence the criteria for permit or change authorization issuance are met, the Department must grant a permit or authorization to change.

Dharma Realm Buddhist Association has filed water right claims for stock water for a maximum of 330 animal units and a

fish and wildlife pond with a capacity of two acre-feet. The Dharma Realm Buddhist Association is located downstream from Applicant. At the time of the hearing, the water flowing in Indian Creek was three inches deep and the cattle had to go down into the creek to reach the water. No measurement was taken to determine the flow rate of the stream. (Department records and testimony of Eric Parrish.)

Simply reducing the stream flow to three inches in depth is not an adverse effect. If the cattle can get to the water and drink their fill, there is no adverse effect. Moreover, Objector is a senior appropriator. When a senior appropriator cannot reasonably exercise his water right, he has the right to call the stream. That is, to contact the most junior user and tell the junior appropriator there is not sufficient water at the senior's point of diversion or in the case of stock water, in the stream. The junior appropriator must then stop diverting the water. Having to call the stream is not an adverse effect unless the senior appropriator needs to call the source constantly.

The intake pipe would be equipped with a controlling device to stop diversion when the source is called or when GLID water is not available during the irrigation season.

6. Applicant has not proven by a preponderance of evidence the proposed use is a beneficial use. Although fish and wildlife is by definition a beneficial use, the proposed flow rate of 24 gallons per minute will produce more than 16.77 acre-feet per

year of water for the flow-through pond. Even after reducing the period of use of Indian Creek water to November 1 through April 30, the flow rate still produces more than the requested amount. The only possible remedy for this problem, at this time, is to reduce the flow rate from 24 gallons per minute to 20.97 gallons per minute which would produce a volume of 16.77 acre-feet from November 1 through April 30. A flow rate of 20.97 gallons per minute would produce an exchange rate of 7.65 days which is within the recommended time for a pond this size. If the flow rate is reduced to 20.97 gallons per minute and the period of time is amended from January 1 through December 31 to November 1 through April 30, then the flow rate and volume requested are reasonable and the use would be beneficial. (Department file.)

7. Applicant has not proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. However, with the changes and conditions set forth in this Finding of Fact, the means of diversion, construction, and operation of the appropriation works are adequate. Applicant proposes to divert water from Indian Creek with a buried plastic pipe. Applicant has been working with the Montana Department of Fish, Wildlife and Parks to determine the correct size pipe needed to divert the water from the stream. Applicant had proposed to have no controlling device on the pipeline; however, because GLID sometimes must stop releasing water to repair ditches or for other reasons and there

is the possibility of a senior appropriator calling the stream, a control valve or other method of control must be installed so water is not being diverted when GLID water is not available during the irrigation season or when a senior appropriator calls the source. In order to prevent taking more water than permitted, Applicant must install a pipe that will divert only 20.97 gallons per minute and the return flow pipe must be sized to release a minimum of 20.97 gallons per minute. Applicant must provide the Kalispell Water Resources Regional Office Manager with the proposed pipeline sizes and controlling device for approval prior to installation. (Testimony of Applicant and Department records.)

8. Applicant has proven by a preponderance of evidence he has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Applicant owns the property. (Testimony of Applicant.)

9. No objections relative to water quality were filed against these applications nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of that permit. (Department file.)

Based upon the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

### CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. § 85-2-307 (1997).

2. If Applicant accepts all the changes recommended by the Hearing Examiner, he will meet all the criteria for issuance of a permit. See Findings of Fact 3 through 9. Mont. Code Ann. § 85-2-311 (1997).

**WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

### PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Beneficial Water Use Permit 76D-104069 is hereby granted to Jay L. Parks to appropriate 20.97 gallons per minute up to 16.77 acre-feet of water per year from Indian Creek at a point in Lot 8, Lindsay Acres Unit 3, further described as the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 3, Township 36 North, Range 27 West, Lincoln County, Montana, for fish and wildlife. The permitted place of use shall be an off-stream reservoir with a capacity of 0.7 acre-foot in Lots 8 and 9 of Lindsay Acres Unit 3, further described as the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of said Section 3. The permitted period of appropriation shall be from November 1 through April 30, inclusive of each year.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

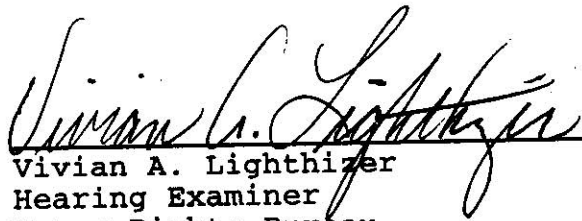
C. Applicant shall install a pipe that will divert no more than 20.97 gallons per minute and the return flow pipe must be sized to release a minimum of 20.97 gallons per minute. Applicant shall install a control valve or other method of control so that water will not be diverted when Glen Lake Irrigation District water is not available during the irrigation season or when a senior appropriator calls the source. Applicant must provide the Kalispell Water Resources Regional Office Manager with the proposed pipeline sizes and a controlling device for approval prior to installation. Failure to provide this information to the Kalispell Water Resources Regional Office will be cause to revoke the permit.

#### NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may

file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the record. Vague assertions as to what the record shows or does not show without citation to the precise portion of the record will be accorded little attention. Any exception containing obscene, lewd, profane, or abusive language shall be returned to the sender. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

Dated this 30<sup>th</sup> day of June, 1999.

  
Vivian A. Lighthizer  
Hearing Examiner  
Water Rights Bureau  
Department of Natural  
Resources and Conservation  
PO Box 201601  
Helena, MT 59620-1601



**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing Proposal for Decision was served on all parties listed below on this 7<sup>th</sup> day of July, 1999, as follows;

JAY L PARKS  
PO BOX 217  
HARLEM MT 59526

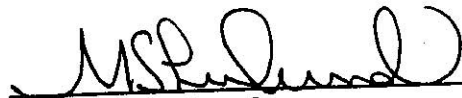
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DBA PINE GROVE RANCH  
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RESOURCES & CONSERVATION  
109 COOPERATIVE WAY SUITE 110  
KALISPELL MT 59903

  
Mandi Shulund  
Hearings Assistant